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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Yolo)

THE PEOPLE,

Plaintiff and Respondent,

v.

RUSSELL LYNN TAFOYA,

Defendant and Appellant.

C059597

(Super. Ct. No.
CRF065854)

A jury convicted defendant Russell Tafoya of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)), and solicitation to commit assault with a deadly weapon (Pen. Code, § 653f, subd. (a)).¹ The trial court found true allegations that defendant had served two prior prison terms and had suffered one prior serious felony conviction. The trial court sentenced defendant to three years, doubled to six years for the assault conviction pursuant

¹ References to an undesignated section are to the Penal Code.

to section 667, subdivision (c) and (e)(1), plus 16 months for the solicitation conviction, plus five years for the prior serious felony conviction enhancement, plus one year for the prior prison term enhancement, for a total of 13 years, four months.

Defendant argues the trial court erred when it failed to give a self-defense instruction and when it sentenced him consecutively for the solicitation conviction. He also argues the trial court incorrectly believed it had no discretion to impose concurrent sentences. We shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant and the victim, Richard Patrick, were both employed at the Sundance Car Care Center in Woodland, California. Nathan Davis was also a Sundance employee. On October 13, 2006, sometime before lunch, defendant, who was not working that day, went to Sundance where Davis was working and asked to speak to him. Davis testified that he owed defendant money, and that defendant offered to forgive the debt plus give him more money if he would "beat [Patrick's] fucking ass." Defendant told Davis that Patrick owed him money and was not paying up. Davis refused, and defendant left.

That same morning, around 10 a.m., defendant approached Patrick while Patrick was working at Sundance and demanded Patrick pay him \$100, even though Patrick only owed defendant \$30. When Patrick informed defendant he did not have the money, defendant was angry and upset. Defendant drove off.

Defendant returned in his car just before 6 p.m. He called Patrick to come over to him, but Patrick refused. Defendant then popped his trunk open, reached in the trunk, pulled out a black aluminum baseball bat, and ran toward Patrick. Defendant swung the bat at Patrick, and Patrick took off running. Patrick grabbed a traffic cone and threw it at defendant. Patrick tried to run into the shop, but the other workers had closed the door. Patrick kept running around the parking lot trying to get away from defendant. Finally the manager told defendant to stop, and defendant put the bat back in his trunk and drove off.

A surveillance camera in the Sundance parking lot recorded the chase. The video was played for the jury.

The manager, Steve Singh, testified defendant was chasing Patrick with a bat and yelling, "come here" and "I'm going to get you." Singh saw defendant swing the bat once at Patrick's head, and thought Patrick was hit. Patrick threw the cone at defendant after defendant took the swing at Patrick's head. Singh saw defendant put the bat back in his trunk and leave.

Another employee, James Sparkman, testified he witnessed defendant take the baseball bat out of his trunk, and run across the parking lot at Patrick. Defendant was yelling profanities at Patrick, and when he got close enough he started swinging the bat at him. He swung the bat three or four times, but never made contact. Patrick threw the cone at defendant after defendant had already taken several swings. When the chase ended, Sparkman saw defendant throw the bat in his trunk and take off in his car.

Defendant testified in his own defense. He claimed Patrick owed him \$140. Contrary to the other witnesses, he testified he was standing near the lube shop, getting ready to leave, when Patrick approached him. They exchanged a few words when defendant noticed Patrick's eyes were focused elsewhere. He followed Patrick's gaze and saw a baseball bat. He grabbed the bat to prevent Patrick from using it. He lifted the bat and swung it down, but only to get Patrick to quit running away from him. His arm was injured when Patrick threw the cone at him. He had a cast put on it when he was in jail. He denied having solicited Davis to hurt Patrick.

DISCUSSION

I

Self-Defense Instruction Not Required

Defendant claims the trial court erred when it failed to instruct sua sponte on the right of self-defense. His argument is based on his testimony, and particularly on his answer to a question posed by defense counsel on direct examination. Counsel asked whether defendant was swinging the bat at Patrick when Patrick hit him with the cone. Defendant replied:

"No. What I did in self-Defense. I went to block him, you know . . . with that. The bat was in my good hand. I went up like that"

A trial court is required to instruct the jury on the general principles of law applicable to the case. However, the trial court is not required to instruct sua sponte on any defense, including self-defense, unless there is substantial

evidence supporting the defense, and the defendant is either relying on the defense or the defense is not inconsistent with the defendant's theory of the case. (*People v. Villanueva* (2008) 169 Cal.App.4th 41, 49.) The trial court was not required to instruct sua sponte on self-defense in this case because the defendant did not rely on self-defense, and it was inconsistent with his theory of the case.

Defendant's theory of the case was that there was no assault because he never swung the bat at Patrick. Defense counsel argued that defendant moved the bat through the air in order to block the cone Patrick threw at him, but he never swung the bat at Patrick. In arguing against the assault charge, defense counsel stated:

"I've heard the word self defense mentioned by a couple of different witnesses in this case, including Mr. Tafoya. You are not going to be instructed on self-defense. In a self-defense case, first somebody would have to acknowledge, and it would have to be evidence, that a blow was struck, a swing was taken, to defend themselves. The self-defense, the defense comes up and when you are actually doing something that would otherwise be prohibited that you are going to be excused for because you are being assaulted. It is not the case here. It is not a self-defense case. It is a case of Mr. Tafoya not swinging at Mr. Patrick."

As is apparent from the foregoing, the theory of the defense was that defendant used no force at all against Patrick. A defense of self-defense impliedly concedes the defendant's own use of force. (*Tyler v. Superior Court* (1980) 102 Cal.App.3d 82, 89, disagreed with on another point in *People v. Memro*

(1985) 38 Cal.3d 658, 683-684.) Thus, a theory of self-defense was not relied on by defendant, and was inconsistent with his theory of the case. The trial court was not required to give a sua sponte self-defense instruction.

II

No Section 654 Violation

Defendant argues a single objective, injuring Patrick, motivated the acts underlying the conviction for assault and solicitation. Therefore, he argues, his sentence for solicitation should have been stayed pursuant to section 654. We disagree.

Section 654 provides that an act punishable in different ways shall be punished under the provision providing for the longest term of imprisonment, but shall not be punished under more than one provision. It has been held to prohibit double punishment for both a single act that violates more than one statute and a course of criminal conduct that "comprises an indivisible transaction[.]" (*In re Adams* (1975) 14 Cal.3d 629, 634.) Whether the course of conduct is divisible depends on the intent and objective of the defendant. If all the offenses are incident to one objective, the conduct is indivisible, and the defendant may be punished for only one offense. (*Ibid.*)

Defendant's error is in assuming the solicitation and the assault can be defined as a course of conduct that comprises an individual transaction. Section 654 "does not prohibit punishment for different offenses where a separate and distinct

act can be established as the basis of each conviction."

(*People v. Stoltz* (1961) 196 Cal.App.2d 258, 264.)

This case involved separate and distinct acts. The act that was the basis of the solicitation offense was the invitation to commit a crime. (*People v. Herman* (2002) 97 Cal.App.4th 1369, 1381 ["The essence of criminal solicitation is an attempt to *induce another to commit* a criminal offense."] (Fn. omitted.) The act that was the basis of the assault offense was the attempt by defendant to hit Patrick with a baseball bat. (§ 240 ["An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another."].)

Not only were the two acts separate and distinct, they were divisible in time. Conduct that is divisible in time, even though directed to one objective, may give rise to multiple punishment where the offenses are "temporally separated in such a way as to afford the defendant opportunity to reflect and to renew his or her intent before committing the next one, thereby aggravating the violation of public security or policy already undertaken." (*People v. Gaio* (2000) 81 Cal.App.4th 919, 935.) In this case defendant offered to pay Davis to beat up Patrick sometime before lunch. The crime of solicitation was complete at that time. The assault occurred around 6 p.m. This gave defendant more than enough time to reflect and renew his intent before committing the assault. The trial court did not err in imposing separate punishment.

III

Consecutive Sentences Were Mandatory

Defendant argues the prosecutor misled the trial court at the sentencing hearing into believing that consecutive sentences were mandatory. We shall conclude that consecutive sentences were mandatory, although not for the reason cited by the prosecutor.²

The prosecutor informed the trial court that consecutive sentencing was mandatory pursuant to section 667, subdivision (a)(8). That subdivision provides:

"Any sentence imposed pursuant to subdivision (e) will be imposed consecutive to any other sentence which the defendant is already serving, unless otherwise provided by law."

Subdivision (e) provided in this case that the sentence for the assault conviction be double the term imposed (the midterm here). However, as defendant points out, subdivision (a)(8) refers to the imposition of a current sentence that is consecutive to one the defendant is already serving, and in this case defendant was not serving any sentence at the time of his convictions.

Nevertheless, a consecutive sentence was mandatory pursuant to section 667, subdivision (c)(6). That subdivision states:

"If there is a current conviction for more than one felony count not committed on the

² The People have conceded that the matter should be remanded for resentencing. We do not accept the concession.

same occasion, and not arising from the same set of operative facts, the court shall sentence the defendant consecutively on each count pursuant to subdivision (e)."

This subdivision is consistent with the focus of the three strikes law, which is to mete out harsher punishment for the recidivist offender. (*People v. Deloza* (1998) 18 Cal.4th 585, 594.)

The Supreme Court has explained the meaning of this provision:

"We read the mandatory consecutive-sentencing provision of the three strikes law as follows: If there are two or more current felony convictions 'not committed on the same occasion,' i.e., not committed within close temporal and spacial proximity of one another, and 'not arising from the same set of operative facts,' i.e., not sharing common acts or criminal conduct that serves to establish the elements of the current felony offenses of which defendant stands convicted, then 'the court shall sentence the defendant consecutively on each count' pursuant to subdivision (c)(6). Conversely, where a sentencing court determines that two or more current felony convictions were either 'committed on the same occasion' or 'aris[e] from the same set of operative facts' . . . consecutive sentencing is not required under the three strikes law, but is permissible in the trial court's sound discretion." (*People v. Lawrence* (2000) 24 Cal.4th 219, 233.)

Here, the solicitation count was charged and sentenced as a felony. Thus, there were two felony convictions that were not committed on the same occasion, not committed within close temporal and spatial proximity, and not arising from the same set of operative facts. The criminal conduct that established

the elements of the solicitation conviction was not the same conduct that established the elements of the assault conviction. The acts constituting the solicitation conviction were completed before the acts constituting the assault conviction began. The completion of a crime is usually dispositive in determining whether the crimes occurred on different occasions. (*People v. Garcia* (2008) 167 Cal.App.4th 1550, 1567.) We conclude it was dispositive here.

The recent amendments to Penal Code section 4019 do not operate to modify defendant's entitlement to credit, as he was committed for a serious felony. (Pen. Code, § 4019, subds. (b), (c); Stats. 2009-2010, 3d Ex. Sess., ch. 28, § 50.)

DISPOSITION

The judgment is affirmed.

BLEASE, Acting P. J.

We concur:

NICHOLSON, J.

BUTZ, J.